Supreme Court of the United States

OCTOBER TERM, 1956

No. 59

HENRY FERGUSON,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

WILBUR E. DOW, JR.
FREDERICK FISH
WILLIAM A. WILSON
Counsel for Respondent
70 Pine Street
New York 5, N. Y.

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OPINIONS BELOW

No opinion was rendered in the District Court.

The opinion of the Court of Appeals for the Second Circuit (R. 118-119) is reported at 228 F. 2d 891.

Statutes Involved

This action is brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, which incorporates the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. § 51.

The Jones Act provides in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

The Federal Employer's Liability Act provides in part as follows:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Question Presented

The question presented is whether the Court of Appeals was correct in holding that there was no substantial evidence of negligence on the part of a shipowner in a case where a ship's baker, who had been supplied with the customary implement, in good condition, for serving ice cream, chose to use a razor-sharp butcher's knife, without a guard, as a dagger to stab and pound ice cream which he had found to be hard.

Statement of the Case

Petitioner brought a civil jury action under the Jones Act for personal injuries alleged to have been sustained by petitioner on March 27, 1950 by reason of respondent's negligence while petitioner was employed by respondent as a baker on board the steamship BRAZIL.

At the close of petitioner's case in the Trial Court respondent moved for a directed verdict, which was denied. The respondent then rested, and requested a charge as follows:

> "15. Defendant was not required for plaintiff's benefit to exercise vigilance to see that plaintiff did

> not use a dangerous implement in a manner for which it was not intended or designed" (R. 94).

The Trial Court declined to charge the jury as requested, and respondent duly objected to this refusal (R. 114-115). Following the charge of the Trial Court, the jury returned a verdict for the petitioner.

Before summation and again following the verdict respondent renewed the motion for a directed verdict. Respondent also moved that the verdict be set aside on the grounds that it was excessive and against the weight of the evidence. Motion was also made in the alternative for a new trial. The Trial Court denied all these motions.

Petitioner thereupon appealed to the Court of Appeals for the Second Circuit. The judgment for petitioner was reversed on the grounds that:

> "There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted" (R. 119).

Summary of Facts

The testimony of petitioner was that on March 27, 1950, between 8:00 p. m. and 8:40 p. m. he was occupied in the galley of the S. S. BRAZIL, on C-deck, serving ice cream from a 2½ gallon container (R. 38, 41, 42). Before the accident petitioner had served a half-used tub and half of another tub of ice cream using a standard ice-cream scoop which shaped the dessert into a ball (R. 42, 43). It is undisputed that this scoop was the usual implement furnished for serving ice cream ashore or afloat and that it was in good condition (R. 42, 72). When over half-way down the second container, petitioner found the ice cream to be harder towards the center and bottom of the tub and difficult to scoop out. Petitioner then picked up a razor-sharp

butcher knife, 18 inches long, kept under a grill nearby, which he knew was used for cutting French bread, and proceeded to loosen the ice cream by holding the knife in his fist, sharp edge outside, stabbing and pounding at the ice cream (R. 44). This knife had no guard between the handle and the blade similar to the flange or guard found on a French knife (R. 61). Petitioner knew it was improper to use a butcher knife in this manner (R. 61). The knife itself was in good condition. Petitioner testified that on one jab the point of the knife hit an extra-hard bit of ice cream and the jolt caused his hand to slip down from the handle of the knife on to the blade, badly cutting his third, fourth and fifth fingers (R. 39).

It is claimed that the ice cream was not properly softened because of defects in the refrigerating machinery or because the storage chest was too cold. There was, however, no testimony to this effect and there was no testimony that there was any trouble whatever with any of the machinery or with the dispensing chest on the day in question (see, R. 49). Testimony of petitioner merely tended to show that the container of ice cream was brought up as customary from a freezing compartment, about 1:00 p. m. on the day of the accident, and placed in a special chill box designed to hold the ice cream for service (R. 50). No evidence was offered as to the temperature of this dispensing chest, though it was established that the temperature of the refrigerator on D-deck was five below zero.

The deposition of Sam Shaffran, the chief refrigerating engineer of the BRAZIL at the time of the accident, was read by petitioner's counsel. Shaffran testified he could not remember trouble with any of the refrigerating machinery on the day of the accident and he had no record of any such trouble. He stated, however, that any defects always resulted in higher temperature and, hence, softer ice cream (R. 29). Petitioner himself said that there never was an

occasion when the ice cream became harder rather than softer in the ice-cream chest. He said, "The heat of the box didn't cause the ice cream to get hard, it caused it to get soft" (R. 65).

Testimony of a dairy expert as to ice cream at various temperatures was not relevant since the temperatures of the dispensing chest was never established. The degree of softness or hardness of the ice cream would be directly affected by the temperature of the dispensing chest where it was stored for over six hours.

Petitioner testified that he had known the knife was for the purpose of cutting French bread and specifically admitted that he knew it was an improper tool for loosening ice cream (R. 61). Petitioner had given a deposition in 1950, shortly after the accident, which conflicted with his testimony at the trial; he admitted that his recollection five years before was apt to be more accurate than his present testimony (R. 53). In his deposition petitioner said he never used the knife to serve ice cream before and that the third baker had only used it to cut bread (R. 69, 92). At trial petitioner said both he and the third baker had used the knife previously to serve ice cream on other occasions (R. 69, 92) but, significantly, he failed to testify that this was known to any of the ship's supervisory personnel.

There was no evidence that petitioner, either expressly or impliedly, was ever ordered to serve hard ice cream.

Argument

This action was brought under the Jones Act where the gist of an action is negligence (R. 91. See "Statement", Petitioner's Brief at p. 4). No claim has been made, nor is now made, that respondent's ship or any of its appliances or equipment were unseaworthy. Doctrines of absolute liability, or liability without fault, which pertain to cases of unseaworthiness have no application here.

The burden was upon petitioner to present substantial evidence of fault on the part of respondent. In the absence of any such evidence he was not entitled to go to the jury. No question of any special affirmative defense such as assumption of the risk or contributory negligence could arise until petitioner first established his basic premise of negligence on the part of respondent.

The Court of Appeals did not rely on any special defense of respondent. It considered only the basic question of negligence. Its finding that there was no evidence of negligence on the part of respondent was dispositive of the case.

That finding was clearly correct.

POINT I

THERE WAS NO EVIDENCE THAT RESPONDENT WAS NEGLIGENT BY REASON OF ANY DEFECTIVE MACHINERY.

Petitioner opened his case in the Trial Court by reading into the record a deposition made by the chief refrigeration engineer of the S. S. Brazil, Sam Shaffran. Far from showing defective machinery, Mr. Shaffran could not recall any refrigerating machinery being defective the day of the accident. He also testified that any defects that might be encountered would result in higher, rather than lower, temperatures and hence soft, rather than hard, ice cream.

Petitioner testified next. He said that he thought the ice cream cabinet was not working properly the day of the accident since he had seen the refrigeration engineer "tinkering around it" (R. 12). However, on further questioning it appeared the engineer might have been only inspecting it as customary, rather than making repairs. Petitioner also testified on cross-examination as follows:

> "Q. (by Mr. Sheneman, respondent's counsel) You told us that the ice cream boxes do not operate

properly from time to time or did not operate properly from time to time. A. That's right.

"Q. Was there ever an occasion when the ice cream in the box became harder rather than softer when the ice cream chest was not operating properly? A. No. The heat of the box didn't cause the ice cream to get hard, it caused it to get soft, and it had to be taken back down in the deep freeze." (R. 65).

Thus it is quite apparent that any defect would have ameliorated the condition of the ice cream complained of, and that daily inspections by the refrigerating engineer were sufficient and reasonable for keeping the machinery in repair.

POINT II

THERE WAS NO EVIDENCE THAT RESPONDENT HAD ANY REASON TO ANTICIPATE DANGER TO THE PETITIONER BY REASON OF THE DEGREE OF HARDNESS OF THE ICE CREAM PETITIONER WAS SERVING.

Petitioner's position that respondent negligently failed to furnish petitioner with a safe place to work in that some of the ice cream near the bottom of a tub was found to be hard presupposes that hard ice cream is dangerous or unsafe. This, respondent respectfully submits, is contrary to plain fact and common sense. Petitioner quite successfully served a half-tub and a half of a full tub of ice cream that had been in the ice cream cabinet for more than six hours, the customary time. There is nothing dangerous about digging out ice cream with a scoop provided for the purpose. It is only when the server on his own initiative attempts to hack it out with a razor-sharp knife that any possibility of an accident arises. To expect respondent's agents or servants to foresee anyone using such a tool, which petitioner himself admits was improper, and to use it in an improper manner is to

argue an omniscience quite superhuman and a result completely remote as a possible consequence to the condition of hardness of the ice cream.

Negligence involves "recognizable risk of harm". The conditions which are necessary to make an act negligent in respect to the harm of which another has complained are summarized in Restatement of the Law, Torts, §§ 281 (b), 430 at page 1157 as follows:

> "The actor's conduct, to be negligent toward another, must involve an unreasonable risk of—
>
> "1. causing harm to a class of persons of which the other is a member and
>
> "2. in certain cases, subjecting the other to the hazard from which the harm results."

These principles were cited with approval in *Marengo* v. *Roy,* 318 Mass. 719. And in *Packwood* v. *Briggs & Stratton Corp.,* 195 F. 2d 971, the Court of Appeals for the Third Circuit said, p. 972:

> "Jury findings of negligence or proximate cause must comport with common law rules devised to give reasonable and systematic meaning to those generalities. For such rules, see Restatement of the Law, Torts, Negligence, Chs. 12-16. And so it is throughout the body of the common law. This authority and responsibility to keep jury findings within reasoned rules and standards is an essential function of United States judges today as it long has been of common law judges. See Capital Traction Co. v. Hof, 1899, 174 U. S. 1, 13-16, 19 S. Ct. 580, 43 L. Ed. 873. It stands as a great safeguard against gross mistake or caprice in fact finding."

In *Freightways, Inc.* v. *Stafford,* 217 F. 2d 831 (8 Cir.), it was said at page 836:

> "One cannot ordinarily be charged with negligence for failing to anticipate negligence on behalf of another."

The requirement of some foreseeability of danger as an essential element of negligence is clearly set forth in *Manhat* v. *United States,* 220 F. 2d 143, cert. den., 349 U. S. 966. In this case, a ship at a pier was undergoing repairs. A lifeboat had been swung outboard on davits but was unsecured other than by falls. Plaintiff, at work in the boat with others, was injured when the boat fell to the pier. This must have been caused by the activation of the releasing gear, which itself was in good condition, by plaintiff's fellow workman. It was claimed that the shipowner was negligent in that a dangerous situation was created when the boat was swung out without special extra lashings. As to this, the Court said at page 147:

> "... the prospect of the falling of a lifeboat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

The significance of foreseeability and the necessity of apprehension of danger as a necessary element in determining the degree of care which may be expected of a reasonable man has been recognized by this Court in other cases involving maritime injuries. *Jacob* v. *City of New York,* 315 U. S. 752; *Jamison* v. *Encarnacion,* 281 U. S. 635.

Assuming *arguendo,* however, that, by some stretch of the imagination, hard ice cream is a dangerous condition, certain prerequisites must be met before respondent can be charged with negligence. Nothing is clearer as a matter of law than the necessity of defendant's knowledge or notice of the condition alleged to be dangerous. Unless the respondent had actual or constructive notice of the condition so as to furnish it with an adequate opportunity to remedy the condition then there is not a cause of action for neg-

ligence under the Jones Act. *Boyce* v. *Seas Shipping Co.*, 152 F. 2d 653 (2 Cir. 1945); *Anderson* v. *Lorentzen*, 160 F. 2d 173 (2 Cir. 1947); *Lauro* v. *United States*, 162 F. 2d 32 (2 Cir. 1948); *Adamowski* v. *Gulf Oil Corporation*, 93 F. Supp. 115 (E. D. Pa. 1950), 197 F. 2d 523 (3 Cir. 1952); *Holliday* v. *Pacific Atlantic S. S. Co.*, 99 F. Supp. 173 (D. Del. 1951), reversed on other grounds 197 F. 2d 610 (3 Cir. 1952), cert. den. 345 U. S. 922; *Shannon* v. *Union Barge Line Corp.*, 194 F. 2d 584 (3 Cir. 1952), cert. den. 344 U. S. 846; *Daniels* v. *Pacific Atlantic S. S. Co.*, 120 F. Supp. 96 (E. D. N. Y. 1954).

A search of the record reveals that at no time did petitioner, or anyone else, complain about or ever mention the condition of the ice cream to his immediate superiors or fellow workers. Such knowledge is a necessary part of petitioner's *prima facie* case as is clearly shown in his complaint. The burden was on the petitioner to prove a *prima facie* case and that burden was not sustained.

POINT III

THERE WAS NO EVIDENCE THAT RESPONDENT FAILED TO FURNISH PETITIONER WITH PROPER TOOLS.

The final possibility of negligence to be charged to the respondent is the use of the razor-sharp knife by the petitioner in digging out the ice cream. Assuming respondent should anticipate the ice cream would be hard on occasion, was respondent negligent in not supplying proper tools? A negative answer has been given by a number of courts in similar cases.

In *Neville et al* v. *American Barge Line Co.*, 105 F. Supp. 405 (W. D. Pa. 1952) a laundress attempted to open a can of milk with a butcher's cleaver rather than a can opener. The court found on these facts that no negligence

could be imputed to the shipowner. In *Cruz* v. *American Hawaiian Steamship Co.*, 1953 A. M. C. 1528 (City Court, New York, not officially reported) the Court said: "All the defendant is required to furnish are tools or appliances which are reasonably suitable and adequate for that purpose." There the libelant messman cut himself while paring vegetables with a butcher knife which was supplied to him for the purpose. He contended a proper salad knife should have been provided. Suit was dismissed for failure to show a cause of action.

The District Court of Massachusetts held in 1951 that "an instrumentality properly used aboard the vessel for one purpose cannot be changed into a dangerous instrumentality by reason of a custom of carelessness and neglect on the part of those who use the instrumentality." *Christiansen* v. *United States of America, et al,* 94 F. Supp. 934 (D. Mass. 1951).

A master is not liable in negligence where a servant is injured in the use of a tool which is without defect if the servant has complete knowledge of and is experienced in the use of such tool. In a recent case directly in point a seaman was ordered to do a job and he himself chose improper tools that resulted in injury. The Court found on the undisputed evidence that the employee alone exercised control over the operations, that he was given the choice of proper and safe tools and chose badly. *Pearson* v. *Tide Water Associated Oil Co. Inc.*, 223 P. 2d 669 (Cal. Ct. of App. 1950, not officially reported).

Respondent requested the Trial Court to make the following charge:

> "Defendant was not required for plaintiff's benefit to exercise vigilance to see that plaintiff did not use a dangerous implement in a manner for which it was not intended." (R. 94)

The Trial Court refused to charge the jury as requested and, under Rule 52 of the Federal Rules of Civil Procedure, respondent made timely objection to that refusal (R. 114). This charge was correct in law and pertinent to the facts and issues in the case. The charge requested was in no way covered in the Court's instructions; plaintiff's counsel specifically objected to its inclusion (R. 114). The Court's refusal to so charge was erroneous and most prejudicial to the respondent.

No question exists that petitioner was supplied with a mechanical scoop in perfectly good condition and specifically designed for serving ice cream. Petitioner chose to hurry the process by taking a knife that was kept under a grill nearby and using it to loosen the ice cream. Petitioner was standing in a galley equipped to serve 500 passengers but he testified that there was no other instrument on the ship other than an 18-inch razor-sharp knife suitable for loosening ice cream! What actually happened is quite obvious. Petitioner had observed the third baker nearby, cutting bread with a sharp knife. When he wanted some utensil to loosen the ice cream, he chose the course of least resistance and took the bread knife from the grill and used it. He could easily have stepped into the next compartment and taken a large spoon with adequate leverage (Defendant's Exhibit A; R. 65, 66, 77, 78); he could have obtained a large fork or even a French knife with an adequate guard at the handle. Instead he decided to use the sharp bread knife with its unguarded blade, and now he seeks to charge respondent with the consequences of his own negligence.

For the first time, at the trial, petitioner alleged that he should have been furnished an ice chipper. This is a bar tool, not a galley tool. It is, as its name indicates, used for ice, not for a confection such as ice cream. As stated by the Trial Court (R. 46), it is used for making highballs. There undoubtedly were several in the ship's bars, and

undoubtedly petitioner could have had one if he had asked for one. It is most significant that petitioner did not testify that he had asked for one, that there was none available, or that he had ever notified any superior that he needed such an implement. There was no evidence whatsoever that its use on ice cream was usual or customary or even known. The ice chipper stands on no different basis than any of a dozen or more implements that could have been used safely to make holes in ice cream. The case remains not one where respondent was negligent, but rather one where petitioner seeks to charge respondent with the consequences of his own negligence.

Again, assuming *arguendo* that any of the above possibilities were negligent acts or omissions by the respondent, and omitting the question of knowledge or notice, we cannot conclude that the events alleged by petitioner as negligence were the proximate cause of the accident. No reasonably prudent employer could have foreseen that hard ice cream might cause a serious accident where an ice cream scoop in perfect working order had been supplied. There is here no chain of causation culminating finally and inevitably in the accident. The sole and proximate cause of the accident was petitioner's decision to reach under a grill and pick up a dangerous and improper tool to hurry the process of serving ice cream. On digging down toward the bottom of the tub petitioner discovered the ice cream to be hard and was, indeed, the only person with that knowledge, or who had occasion to have such knowledge. He had no order to serve ice cream come what may, nor was he caught up inextricably in a fast moving set of circumstances. Given the condition of the ice cream at that moment, no dangerous condition existed. With adequate time for deliberation, petitioner, by his own decision, became an independent intervening cause directly resulting in an accident through his own gross negligence.

"Q. Then would you say the knife that you used on this particular occasion was improper. A. That's right.

Q. What was the purpose of this knife? A. They used it for to cut French bread.

Q. It wasn't put there to serve ice cream, was it? A. No.

Q. It was in the bake shop for the use of the baker in cutting French bread? A. That's right." (R. 61)

Petitioner had been a baker since 1910 and had been at sea since 1945 after a long period ashore. He was familiar with all the types of utensils available in a galley equipped to serve 500 passengers.

Petitioner had a number of choices. He could have continued serving with the ice-cream scoop by exerting a little more effort and scraping with the edge. Far better, he could have complained of his difficulties to his immediate superiors and received instructions as to what to do. The respondent is not an insurer of plaintiff's safety. The law does not require the shipowner to supply the best or perfect equipment and appliances but only those that are reasonably safe and suitable. *Doucette* v. *Vincent*, 194 F. 2d 834 (1 Cir. 1952); *The Crickett*, 71 F. 2d 61 (9 Cir. 1934); *Ruberry* v. *United States*, 94 F. Supp. 683 (E. D. Mich. 1950).

Before a case may go to the jury, sound probative evidence should be available for their consideration. This Court stated the rule in *Gunning* v. *Cooley*, 281 U. S. 90, at p. 94:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether

> there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Improvement Company* vs. *Munson,* 14 Wall. 448. *Pleasants* vs. *Fant,* 22 Wall. 116, 122."

And in *Brady* v. *Southern Railway Company,* 320 U. S. 476, it was said, at p. 479:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Such is the case at bar. Petitioner has alleged that the ice cream was hard, but this was a temporary condition not dangerous *per se* and unknown to the respondent. Petitioner admitted that he had been supplied with an ice cream scoop in good working order, and that he used, in an improper manner, a knife which he knew to be improper and which was not in the galley for serving ice cream. Petitioner has not alleged or proved any facts whatsoever from which the jury could have possibly found negligence on the part of anyone other than petitioner himself.

POINT IV

THE DECISION OF THE COURT OF APPEALS INVOLVES NO NOVEL POINT OF LAW AND IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

The holding of the Court of Appeals that under the Jones Act there is no liability without fault is in accordance

with the express provisions of the pertinent statutes. *Jamison* v. *Encarnacion*, 281 U. S. 635; *DeZon* v. *American President Lines, Ltd.*, 318 U. S. 660. There is no case which holds to the contrary.

Petitioner's case is based essentially on claims that respondent furnished defective appliances and that in any event there is an absolute liability which rests upon respondent.

We have already shown that on petitioner's own testimony the appliances he had and used were in *perfect good order and condition.*

The claim as to absolute liability is premised upon unsafe working conditions. This, too, is without any support whatever in the testimony. In any event, the doctrine of liability without fault has no place in a Jones Act case.

Petitioner further contends, however, that the shipowner has an absolute duty to anticipate and provide against negligence on the part of the petitioner himself and that the shipowner is absolutely liable for injuries caused by fortuitous or negligent action of petitioner regardless of the safeness and reliability of the appliance or working conditions furnished by the ship. In practical terms, this amounts to holding a shipowner an insurer for all shipboard injuries, an unprecedented basis for maritime indemnity. Decisions cited by petitioner were all holdings that shipowner is liable for failure to provide a safe place to work because of a faulty appliance or a structural defect of the vessel. *Pacific American Fisheries* v. *Hoof*, 291 Fed. 306 (9 Cir.) (fastenings of ladder missing); *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (gasoline in coal-oil car); *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (defective rope used in rigging staging); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (defective step); *Jacob* v. *City of New York*, 315 U. S. 752 (worn and defective wrench).

While there may be liability without fault under the doctrine of unseaworthiness for injuries caused by defective appliances, *The Osceola,* 189 U. S. 158, no case has been cited by petitioner which holds that liability may be imposed under the Jones Act without proof of negligence. There is no case which so holds. Cases holding that under the Jones Act there is a non-delegable duty to provide a safe place to work go no further than to hold the shipowner responsible for the negligence of a person to whom the duty, in fact, has been entrusted.

Even under the doctrine of unseaworthiness, the Court has recently held that "warranty of seaworthiness does not mean that the ship can weather all storms" but only that it be "reasonably fit" for the purpose at hand and that "the problem (of unseaworthiness) as with many aspects of the law, is one of degree". *Boudoin* v. *Lykes Bros. Steamship Co., Inc.,* 348 U. S. 336, 339, 340. Accordingly, the shipowner has never been held obligated to provide an accident-proof ship, *Lake* v. *Standard Fruit and Steamship Co.,* 185 F. 2d 354 (2 Cir.), but only to furnish reasonably safe or adequate tools and working conditions. *Doucette* v. *Vincent,* 194 F. 2d 834 (1 Cir.); *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397 (2 Cir.); cf. *Jacob* v. *City of New York,* 315 U. S. 752, 758, where the Court said "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable". In the *Jacob* case, a seaman was injured because of the slipping of a worn and defective wrench which was of the type best suited for the job and which was usually used for the purpose, the seaman previously having made repeated requests for a replacement of the wrench.

In the present case, there was no evidence whatever of unseaworthiness, and it was, of course, for this reason that petitioner's experienced counsel founded his claim solely on the provisions of the Jones Act.

There is no reason to discuss the "simple tool" doctrine for, as stated, in petitioner's brief, p. 12, the Court of Appeals did not rely on this doctrine and did not refer to it. As petitioner agrees that his tools were not defective, the doctrine has no application.

There is also no need for discussion of contributory negligence or assumption of the risk. Before any such questions can arise there must be a finding of fault on the part of the shipowner. The Court of Appeals could not have stated the basis for its decision more clearly: "There being no proof of fault on the part of the shipowner . . .".

The subjects of contributory negligence and assumption of the risk were never reached.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Second Circuit is correct and should be affirmed.

WILBUR E. DOW, JR.,
FREDERICK FISH,
WILLIAM A. WILSON,
Counsel for Respondent